

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Kellogg Company,

Petitioner,

Case No. 15-2031

NLRB Case No. 15-CA-115259

v

THE NATIONAL LABOR
RELATIONS BOARD,

Respondent.

NOTICE OF REQUEST FOR A MUST PANEL

Kellogg Company (“Kellogg”) filed a Petition for Review of a decision of the National Labor Relations Board (“NLRB”) on August 28, 2015. The Court has docketed this Petition as Case No. 15-2031.

The Court previously considered this same dispute in *NLRB v. Kellogg Company*, Sixth Circuit Case No. 14-6086. Although these appeals do not arise from the same lower court or agency case numbers, Kellogg’s subsequent appeal should be returned to the original panel “due to [its] interrelatedness with the original matter.” *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002)

(subsequent appeal of district court class certification ruling was a “must panel” case because prior panel had issued a decision on related motions for intervention).

Kellogg is filing this Notice so that the related nature of the appeals is brought to the Clerk’s attention promptly for consideration of whether the panel that considered the first appeal must also consider this second interrelated appeal. For the reasons discussed below, Kellogg respectfully submits that the panel of judges who presided over Case No. 14-6086 must also be assigned to the above-captioned case.

Assigning the newly docketed appeal to the prior panel will fully support the important interests of judicial economy and efficiency, and is consistent with the Court’s must panel practice. These interests will be advanced significantly because the two cases are substantially interrelated. Indeed, the facts, legal issues, and arguments will be largely identical to those raised and considered by the panel which considered Case No. 14-6086.

Case No. 14-6086 involved Kellogg’s appeal of the district court’s entry of a preliminary injunction sought by the NLRB’s General Counsel under Section 10(j) of the NLRA, based on a theory that the Employer’s contract proposals to change an expired collective bargaining agreement would indirectly modify terms of another existing agreement. The injunction was temporary, was

issued before an NLRB Administrative Law Judge ruled that Kellogg's proposals did not violate the Act, and was kept in place pending a decision from the NLRB.

On May 7, 2015, after oral arguments in the initial case (No. 14-6086) but before the Court issued a decision on whether the injunction should be dissolved or maintained, the NLRB decided the underlying agency dispute. Doing so dissolved the injunction as a matter of law and obviated the need for the first panel of this Court to issue an opinion on the merits.

The current appeal before the Court is Kellogg's petition for review of the NLRB's May 7, 2015 decision, in which the NLRB reversed an Administrative Law Judge decision in Kellogg's favor. Kellogg and the General Counsel fully briefed the prior appeal, and a panel of this Court, comprised of Sixth Circuit Judges Moore, McKeague, and Guy, has already considered the extensive administrative record and heard lengthy oral argument on April 23, 2015.

The current appeal and prior appeal are substantially interrelated. They involve the same extensive, detailed administrative record and many of the same issues previously briefed and considered by the prior panel will be presented for resolution in this subsequent case. Specifically, the panel assigned to this appeal will be asked to consider the following issues, all of which were briefed in the previous appeal:

- Whether *Milwaukee Spring Div.*, 268 NLRB 601 (1984) dispositively establishes that Kellogg did not violate the NLRA because the Board

has consistently rejected the indirect or “effective” modification theory under Section 8(d) of the Act upon which the General Counsel and the Board’s May 7, 2015 decision relies.

- Whether an unwritten, indeterminate contract term can be imposed on the parties by the Board when such a term does not exist in the contract itself.
- Whether the Board or district court may base their decisions on their subjective view of the parties’ contract proposals governing mandatory subjects of bargaining, despite unequivocal disclaimers in the language of the proposals themselves.
- Whether the Board or district court may rely on verbal statements made at the bargaining table if doing so ignores and contradicts the plain language of Kellogg’s contract proposals and the contract language itself.
- Whether the Board and the district court incorrectly refused to apply the Board’s longstanding “clear and unmistakable waiver” standard or any other recognized legal standard.
- Whether the Board erred by failing even to address *Milwaukee Spring* or to articulate or follow *any* controlling legal standard when it departed from settled law.

Because of the identical nature of many of the facts, issues, and arguments in this appeal (Case No. 15-2031) and those in Kellogg’s prior appeal (Case No. 14-6086), judicial economy and efficiency will be advanced substantially by assigning the same panel to the above-captioned appeal.

Kellogg respectfully submits that the previously-assigned Circuit Court Judges who considered the parties’ prior briefs and who conducted oral argument will already have an advanced understanding of the factual background and underlying issues that form the basis for the parties’ arguments. This

familiarity will also allow the parties to present their arguments to the Court more effectively and efficiently.

For all of these reasons, Kellogg submits that the same panel that presided over Case No. 14-6086 must preside over the above-captioned appeal in this case.

Dated: August 31, 2015

Respectfully submitted,

MILLER JOHNSON

s/David M. Buday

DAVID M. BUDAY (MI Bar #43087)

KEITH E. EASTLAND (MI Bar #66392)

100 West Michigan Avenue, Suite 200

Kalamazoo, Michigan 49007

Phone: 269-226-2952

Fax: 269-978-2952

e-mail: budayd@millerjohnson.com

e-mail: eastlandk@millerjohnson.com

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2015, a true and correct copy of the foregoing was filed using the CM/ECF system which will send notice to counsel of record.

s/David M. Buday